Filed 8/23/10 In re Perez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ANTHONY PEREZ on Habeas Corpus.	G042603 (Super. Ct. No. C-58260) O P I N I O N

Original proceedings; petition for a writ of habeas corpus. Petition granted. Writ issued.

Anthony Perez, in pro. per.; and Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Edmund G. Brown, Jr., Attorney General, Julie L. Garland, Assistant Attorney General, and Julie A. Malone and Gregory J. Marcot, Deputy Attorneys General, for Respondent.

* * *

In March 1986, petitioner Anthony Perez pleaded guilty to one count of second degree murder. The court sentenced him to 15 years to life. More than 22 years later, on November 6, 2008, the Board of Parole Hearings (the Board) found petitioner to be suitable for parole and granted him parole on special conditions. But on April 1, 2009, Governor Arnold Schwarzenneger reversed the Board's decision. Petitioner sought a writ of habeas corpus from the Orange County Superior Court, which denied his request. Petitioner now asks this court for a writ of habeas corpus, arguing he does not present a current threat to public safety. For the reasons discussed below, we grant the petition.

FACTS

The Commitment Offense[1]

On July 27, 1985, petitioner was a member of the Delhi Street Gang and "'had been drinking heavily since early morning.'" As petitioner and his friends "'kick[ed] back drinking'" in the Delhi barrio, the victim, Manuel Galvin, came walking around the corner. Petitioner called Galvin over, "asked him for a cigarette," and inquired what gang he claimed. Galvin "denied any gang affiliation but admitted that" his cousin was a Loper. (The Lopers, a rival gang, had recently broken an unwritten rule by shooting at petitioner's friend's house.)

[1] At the 2008 parole hearing, petitioner exercised his right not to discuss the commitment offense; therefore, the Board adopted by reference the description "found in the Board report that was prepared for the December 2004 calendar," as well as petitioner's "version from that same Board report." We find no such report in the record. We therefore base our description of the commitment offense on the 2002 and 2008 psychological evaluations of petitioner, as well as the transcript of the 2008 parole hearing.

Petitioner and three other Delhi Street Gang members beat and kicked Galvin, using no weapons. They dragged Galvin to another location "and left him unconscious on the sidewalk."

Petitioner "and his girlfriend then entered a house." Later, petitioner "went outside to see if the police had come. He saw [Galvin] walking slowly down the street and followed him. [Petitioner] picked up a two-by-four board and hit [Galvin] with it. [Galvin] fell unconscious and died of blunt force trauma."

The 2008 Parole Hearing

At the November 2008 parole hearing, the Board summarized petitioner's criminal record prior to the commitment offense. He had started smoking marijuana at age 12, joined the Delhi Street Gang at age 13, and started drinking alcohol at age 15. Most of his friends at that time were Delhi Street Gang members. He committed battery at age 15, spent 90 days in a youth camp, and was placed on probation. While still a minor, he was arrested for possession of alcohol, attempted murder, attempted robbery, possession of a dangerous weapon, and violation of probation, and spent time in a youth camp for attempted burglary. Petitioner earned his GED at that camp. He was "under the influence of alcohol during the commission of most of [his] crimes."

At the time of the 2008 parole hearing, petitioner was 41 years old. Numerous friends and relatives had written letters of support on his behalf. Over the years, petitioner had consistently communicated with his family members with "homemade cards" and "steady phone calls." His supporters offered him a home, employment, and financial, emotional, and spiritual support.

Petitioner had been free of any serious "disciplinaries" for over 20 years. Early in his prison term, he had suffered two serious violations — one for participating in a riot in 1986 and the other for "a dangerous property" in 1987. He had been free of any "minor write-ups" for 13 years, with his last one being for "horse playing" in 1995.

Petitioner had earned 30 credits at Coastline Community College. He had completed vocational programs in upholstery and graphic arts. He was currently employed in graphic arts and had received "[v]ery good . . . work reports," which described him as "an outstanding graphic artist." When asked about that, petitioner deferred, "Well, I wouldn't say outstanding. I'm all right. . . . Hold my own." His supervisor had rated him exceptional in all areas.

Petitioner had received several chronological records (chronos) for his participation in We Care, "a juvenile deterrent program," where youth are brought from schools, probation departments, and juvenile halls, and given day tours of prison. Petitioner was "the current chairman" of We Care, and led the prison tours, showing the youth "about everyday life [in prison] — what we have to go through and what we miss . . . ." He "show[ed] them . . . this is where you're headed if you keep going down that same path. . . . I've been there . . . I was down that same road . . . which led me to here . . . ." One chrono was "from a youth counselor thanking [petitioner] for what [he] did," along with the youths' "comments about, 'My visit to Soledad Prison.'"

Petitioner had continuously participated in Alcoholics Anonymous (AA) from at least as early as 1996. He carried a card on "the Twelve Steps with [him] everywhere" he went and realized one had to work the steps "your whole life." At the hearing, he was able to identify and discuss the Twelve Steps as requested.

Petitioner had participated in many other self-help programs, including victim awareness, rage management, and religious programs, as well as individual therapy.

In a 2008 psychological evaluation of petitioner, Dr. Thacker observed petitioner showed no symptoms of any thought, mood, or neuropsychological disorder. As far as insight into the crime, petitioner had stated "he was into the gang lifestyle" at the time of the offense and "was upset" because the Lopers had broken an unwritten rule by shooting at a house. Defendant believed his gang had "to get these guys back." When the victim said his cousin was from the Lopers, petitioner "started hitting him," "thinking that's what you get for coming over here" when "[y]ou people shot up a house." "Thinking about the situation now he realized that [had] the victim been from a rival gang he would never have approached their group when they called him over and would have instead ran away." "He later went outside for a cigarette and saw the victim getting up. . . . [T]he victim looked at him and in Spanish said, 'You are going to pay for that'. . . . [Petitioner] picked up a 2 x 4 that was nearby and began to walk towards the victim, and as he walked away he yelled at the victim to come back and the victim replied, 'No.' Then the victim turned to face him and he hit him in the legs with the board and recalled thinking oh, yeah, you're going to get a lesson. When the victim fell he then hit him in the head twice." "When asked what he believed led him to such behavior and thinking he indicated that [the] thinking of the gang was kill or be killed. He also stated that when sober, 'I did not buy into it but when I was drunk I was different.' He also explained, 'My pride and the macho stuff got out of control.'" "When asked how he changed over the years he replied, 'Over time I matured. I've thought about things I should have done and the things I have done that were wrong. I would never return to that lifestyle.' In comparison to the short fuse he had in his youth he stated, 'My fuse goes around the block.' When asked how he was able to change the length of his fuse he replied, 'Lots of reflection, thinking, talking, reading and therapy.'

When asked about the effects of the crime he acknowledged that the victim's family was affected greatly. He also talked about it being a sad thing that no one was present at the Board to represent the victim. When asked about his thoughts on his plan for avoiding violence and criminal behavior in the future he replied, 'I've been able to function in here with the worst of the worst without any major problems. It's about the type of people you surround yourself with, positive friends. I will focus on family . . . .'" Dr. Thacker found petitioner's risk assessment potential to be "'in the very low range of psychopathy overall'" and "'within the low range for future violence,'" and that he had "'developed excellent insight into the factors leading to the commission of the life crime.'"

The Board then invited counsel to make closing statements.

The deputy district attorney expressed the People's view that petitioner was unsuitable for parole. He argued the motive for the commitment offense had been "very trivial" and that petitioner "has a long juvenile history for crimes." Although petitioner had made "good strides," an "area of concern is he intends to reside back in . . . the same area where this gang activity was dominant" and that he needed "some sort of a relapse prevention program." In sum, the deputy district attorney believed petitioner "has a few areas in which to gain further insight and development" to ensure the safety of the community.

The Santa Ana Police Department had submitted a letter asking the Board to deny petitioner parole because he had "'exhibited such propensity for violence and lack of remorse'" and "'could potentially put others at great risk.'"

Petitioner's counsel argued petitioner had committed the crime 22 years ago when he "was only 19 years" old. Now, at age 41, petitioner had upgraded himself with self-help programs and vocational training and had taken responsibility and expressed remorse for the crime. The most recent psychological report "says he has excellent insight [and is] in the low [range in] risk of future violence. When everything is

taken together, it is obvious that he is definitely no longer a danger to society or a threat to public safety."

Petitioner then read his prepared statement and expressed "great remorse for what [he had] done to [the victim] and his loved ones." "What is necessary is for me to understand what happened in the crime, what could have stopped me from committing it and how I can keep from something like this happening ever again. The only thing that remains for me is to lead a life of service, example and selflessness . . . to attempt some solace to all concerned. . . . I understand the destructive, self-perpetuating cycle that I initiated with my crime[. I am committed to] what it will take to break that cycle. My life has almost come full circle. My longstanding participating in We Care has made me realize the only chapter remaining for me is to be able to speak [to] at risk youth[] at schools, youth centers, on the streets and through probation departments to provide these kids with options and knowledge and information . . . . In me society has received their money's worth of rehabilitation. Along with my conscious choice and effort you've helped train me and mold me into a better human being. . . . My only regret is that such a transformation had to come at such an immeasurable price, the life of Mr. Galvin for which I am truly and sincerely sorry."

The Board's 2008 Parole Grant

The Board found petitioner was suitable for parole and would *not* "pose an unreasonable risk of danger to society or a threat to public safety if released from prison," subject to the parole conditions that he not "use or possess alcoholic beverages, . . . submit to alcohol testing, . . . participate in a substance abuse program such as AA . . .[, and] not actively participate in, promote, further or assist in any prison gang, disruptive group or criminal street gang activity," and not knowingly associate with any such group or gang.

The Governor's 2009 Reversal of the Board's 2008 Parole Grant

Pursuant to Penal Code section 3041.2, the Governor in April 2009 reversed petitioner's parole grant, believing "his release would pose an unreasonable risk of danger to society at this time." The Governor based his decision on (1) the historical factors of the gravity of the crime, petitioner's trivial motive for it, and his "callous disregard for his victim's life and suffering"; (2) the 2008 mental health evaluation, in which the psychologist rated petitioner a low-moderate risk on two assessments; and (3) petitioner's lack of "insight into the effect of alcohol abuse in his life."

Habeas Corpus Petition to Superior Court

In May 2009, the superior court ruled the "Governor did not abuse his discretion in deeming petitioner currently unsuitable for parole. The Governor afforded individualized consideration to the issue before him and his decision is supported by some evidence in the record."[2]

---

[2] At a December 2009 parole hearing (with a different presiding and deputy commissioner than at the 2008 hearing), the Board discussed the Governor's concerns expressed in his letter reversing the Board's 2008 parole grant: "He had some concerns about your insight into the effect alcohol abuse has had on your life. We discussed that quite thoroughly . . . in the hearing today. We think that you have that under control." Although petitioner had stated in the psychological interview that he didn't "really need" AA, he had "made up [his] mind" not to use alcohol and had mentioned at the last hearing he would "continue with" AA. The Board again found petitioner suitable for parole because "the positive aspects of [his] case heavily outweigh the other considerations" previously discussed at the hearing.

On April 19, 2010, the Governor reversed the Board's 2009 parole grant for the same reasons expressed in his 2009 reversal, along with an additional emphasis on the Governor's belief petitioner "has neither gained sufficient insight into the factors that led to the murder nor accepted full responsibility for his role in the offense . . . ." The Governor pointed out petitioner "consistently claimed that he just 'snapped,' and wanted to teach Galvan a lesson, but did not intend to kill him."

Because the Governor reversed the Board's 2009 parole grant and therefore petitioner is still in prison past his effective parole date (based on the Board's 2008 parole grant), this petition for a writ of habeas corpus is not moot.

DISCUSSION

Petitioner argues the Governor's "2009 reversal of the 2008 parole grant was unsupported by some evidence that [he] remains an unreasonable risk of danger to the public if released, and was otherwise arbitrary, in violation of the due process clauses of the California and United States Constitutions."

The Attorney General counters "the Governor justifiably concluded that the aggravated circumstances of [petitioner's] aggravated commitment offense remain probative to his current dangerousness because of a recent psychological assessment that indicated that [he] posed an elevated risk of committing future antisocial acts, as well as the evidence indicating that [he] may not have developed adequate insight into his alcoholism, which was a significant contributing factor to his commission of murder." He argues there "was more than a modicum of evidence in the record to support the Governor's decision that [petitioner] continues to pose a risk to public safety."

In *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), our Supreme Court recognized that appellate courts face a difficult task in trying "to strike an appropriate balance between deference to the Board and the Governor and meaningful review of parole decisions." (*Id.* at p. 1206.) *Lawrence* therefore enunciated and explained at length the proper standard for judicial review of the Board's and the Governor's parole decisions: "[B]ecause the core statutory determination entrusted to the Board and the Governor is whether the inmate poses a current threat to public safety, the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." (*Id.* at p. 1191.) "This standard is unquestionably deferential, but certainly is not toothless." (*Id.* at p. 1210.) "'Due consideration' of the specified [suitability and unsuitability]

factors[3] requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision — the determination of *current dangerousness*." (*Lawrence*, at p. 1210, italics added.) In other words, the Board or the Governor may not "simply point[] to the existence of an unsuitability factor and then acknowledg[e] the existence of suitability factors . . . , even if those facts have no bearing on the paramount statutory inquiry." (*Id.* at p. 1211.) With these precepts in mind, we examine the Governor's three stated reasons for his 2009 reversal of the Board's 2008 grant of parole to petitioner.

Insight into Alcohol Dependence

One of the grounds for the Governor's 2009 reversal of the Board's 2008 parole grant was his conclusion petitioner lacks "insight into the effect of alcohol abuse in his life." To support this conclusion, the Governor relied on selected excerpts from petitioner's quoted statements in the 2008 psychological evaluation: "'I don't think I need [AA] to not drink . . . I don't need AA to remind me where I was . . . .'" and, "when asked if he believed that he could drink in a controlled fashion, . . . 'I might could [*sic*] control it, but I'm not going to take that chance.'" But the Governor took these comments out of context. To be fair, petitioner's comments about alcohol use must be viewed in their entirety, as follows: "When asked about his AA participation, [petitioner] replied 'it is sometimes good and sometimes not good.' He explained that it is not good when some inmates use the meeting as a forum to 'vent' their issues and dominate the meeting. When asked if he would continue to attend AA in the community, he stated 'I don't think I need it not to drink. . . . I quit drinking and smoking cold turkey and I don't

[3] "Title 15, Section 2281 of the California Code of Regulations sets forth the factors to be considered by the Board in carrying out the mandate of the statute," including circumstances tending to show suitability and unsuitability for parole. (*Lawrence*, *supra*, 44 Cal.4th at p. 1202.)

need AA to remind me where I was that I took someone's life . . . but I can help others by being there.' He explained that he plans to never drink again and described a conversation he had with a relative who said they would throw him a release party when he is released. He stated that he told them it had to be a party without alcohol. When they questioned his request, he explained that he will always be an alcoholic and should never drink or be around alcohol in the future. When asked if he believes he could drink in a controlled fashion, he replied 'I might could control it but I'm not going to take that chance.'"

Dr. Thacker concluded petitioner's alcohol dependence was "in sustained full remission" and that petitioner "has consistently participated in AA for many years and was able to insightfully discuss what he has learned[,] including what led to his abuse of alcohol and what he needs to do (or not do) in the future in order to continue his sobriety successfully. Although he does not feel he needs AA to remain sober, he stated that he will attend and that his attendance may in turn help someone else. His commitment to sobriety seems sincere and genuine."

Similarly, the Board found petitioner had "been a good, steady, active participant in AA from [1996] through 2008[,] had a good knowledge of the [Twelve] Steps," and carries a Twelve Steps card with him at all times. Furthermore, the Board imposed parole conditions that petitioner "submit to alcohol testing, . . . participate in a substance abuse program such as AA," and not "use or possess alcoholic beverages."

In sum, contrary to the Attorney General's assertion that petitioner believes "he could resume drinking alcohol without it becoming a problem," "it is evident from the full context of petitioner's statements" (and his demeanor observed by the Board and Dr. Thacker) that he intends to attend AA meetings and plans to never drink or be around alcohol. (*Lawrence, supra*, 44 Cal.4th at p. 1222.) "Accordingly, the Governor's conclusion that petitioner showed insufficient [insight into his alcohol addiction] is not

supported by any evidence; rather, it is clearly contradicted by abundant evidence in the record." (*Id.* at p. 1223.)

Low to Medium Risk of Violence Assessments

The Governor also focused on Dr. Thacker's rating of petitioner as a low to moderate risk on two assessments in the 2008 psychological evaluation. For that evaluation, Dr. Thacker completed three assessment measures in evaluating petitioner's "future violence risk": (1) the Psychopathy Checklist-Revised (PCL-R); (2) the Historical, Clinical, Risk Management-20 (HCR-20); and (3) the Level of Service/Case Management Inventory (LS/CMI)."

On the PCL-R, petitioner's "score fell in the *very low* range of psychopathy overall," a score "lower than approximately 91% of the male prison population."

On the HCR-20, petitioner's score fell in the low-moderate range. The HCR-20 is divided into three "domains." In two domains, petitioner scored very well: "In the 'clinical' or more current and dynamic domain of risk assessment, [petitioner] has developed excellent insight into the factors leading to the commission of the life crime." In the "'risk management'" domain, petitioner has feasible residential and employment plans for parole, anticipates "emotional and financial support from his family which is evident from the letters of support," and "has participated in AA for many years, developed good insight into his reasons for drinking in the past and developed good insight into how to remain sober in the future." But due to his score on the third domain — the "'historical'" domain (which factored in his conviction "of a murder . . . at age 19" and "history of violence prior to the life crime") — petitioner's overall score on the HCR-20 was in "the *low-moderate* range." Dr. Thacker "noted that the data obtained from the historical section [is] not amenable to significant change regardless of the number of years of his incarceration or the amount of 'programming' completed. Given

the data obtained for [petitioner] in the historical section, his score on the overall HCR-20 will likely never fall below the low-moderate range."

Similarly, on the LS/CMI, "due to more historical factors, [petitioner's] rating on this instrument is not likely to fall below the low-medium range regardless of any additional programming or the development of additional insights." Those historical factors included "having multiple prior convictions, having been incarcerated, having been punished for institutional misconduct, having failed on supervised release, having been suspended/expelled from school, not having completed regular 12th grade education, having some criminality within his family, having some criminal acquaintances/friends, having few anti-criminal acquaintances/friends, having a past alcohol problem, and having antisocial behavior emerge at a young age."

In her ultimate conclusions, Dr. Thacker stressed that "[o]verall current risk assessment estimates suggest that petitioner falls within the *low* range for future *violence*." Dr. Thacker explained that, although two tests placed petitioner's risk assessment in "the low-moderate range, closer analysis of both instruments revealed that [his] scores were largely driven by historical factors such as his involvement in crime and his antisocial mindset in his late teen years. No amount of sight or programming can change those factors. Data considering his current functioning and thinking were all viewed to be very positive and placed him in the low to very low risk category. Thus, current risk is felt to be more accurately rated as low."

In essence, then, the Governor's conclusion that petitioner "pose[s] an elevated risk of committing future antisocial acts" is based on historical facts and ignores Dr. Thacker's assessment of petitioner's current risk for future violence as being low to very low. As stated in *Lawrence*, "the passage of time is highly probative to the determination before us." (*Lawrence*, *supra*, 44 Cal.4th at p.1224.) Reliance upon historical factors underlying two low-to-medium assessments (on which petitioner scored lower than 87 percent of the North American sample of incarcerated male offenders, as to

the LS/CMI) — clearly contradicted by Dr. Thacker's assessment of petitioner's current risk for violence — "does not supply some evidence justifying the Governor's conclusion that petitioner continues to pose a threat to public safety." (*Ibid.*)

Commitment Offense

Finally, as the sole remaining ground for his decision, the Governor cited historical factors relating to the commitment offense: the gravity of the crime, petitioner's trivial motive for it, "some level of premeditation," and his "callous disregard for his victim's life and suffering." But although "the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre or post incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*Lawrence*, *supra*, 44 Cal.4th at p. 1214.) As discussed above, the record contains no evidence of such implications suggesting petitioner is currently dangerous.

DISPOSITION

Petitioner's request for a writ of habeas corpus is granted. We hereby vacate the Governor's 2009 decision finding petitioner unsuitable for parole and reinstate the Board's 2008 grant of parole to petitioner. (*Lawrence*, *supra*, 44 Cal.4th at pp. 1190-1191 [affirming appellate court's judgment vacating Governor's decision and reinstating Board's grant of parole].) Petitioner is to be released accordingly. Petitioner is *not*, however, entitled to any credit against his parole term for the time he spent in prison after

the effective date of the Board's 2008 parole grant. (Pen. Code, § 3000.1, subd. (b); *People v. Chaudhary* (2009) 172 Cal.App.4th 32, 38; see also *In re Carabes* (1983) 144 Cal.App.3d 927, 931 ["the purpose of parole is to provide a testing period for reintegration of the prisoner into society"].) Pursuant to California Rules of Court, rule 8.387(b)(3)(A), this opinion shall be final as to this court five days after it is filed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.